(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term 1998

DAVID KEITH SUMRELL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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72 pp

QUESTIONS PRESENTED

1. Whether a person can be convicted of Felony Embezzlement when the property in question belonged to the person selling the equipment, through a Bona Fide Claim?

2. Whether a person can be held to answer for a crime when the Commonwealth Attorneys' Office gave false information to the Grand Jury for indictment.

3. Whether a person can be compelled to witness against himself in a criminal case.

4. Whether a person can be denied the due process of a fair trial and post-trial relief.

5. Whether a person can be convicted of a crime without being informed of the nature and cause of the accusation.

6. Whether a person can be convicted of a crime when not permitted to confront witnesses against him.

7. Whether a person can be convicted of a crime when no witnesses--except for self and spouse--are called on his behalf.

8. Whether a person can be denied a trial by jury.

9. Whether a person can be wrongfully indicted and convicted, abridging his life, liberty and property, without due process of law.

10. Whether a person can be denied equal protection of the laws.

11. Whether a person, while their case is in progress, can be subject to a change in a law designed to protect an attorney's interest under the colors of state.

12. Whether a person(s) can be denied post-trial relief, including the extraordinary remedy of a Writ of coram vobis, even after admission by his post-trial lawyer to the Virginia State Bar that he had failed to perform the necessary acts to ensure due process on behalf of his client.

13. Whether a person can be deprived of his rights and privileges as guaranteed by both the United States and Virginia Constitution, in order to protect the attorneys and to insure his conviction would not be overturned.

14. Whether a person(s) of a minority group of wrongfully convicted Americans can be denied equal protection of the laws when two or more persons in the Commonwealth ---including Commonwealth Attorneys' Bob Humphreys, Albert Alberi, and A. Farasahi; the Circuit Court of the City of Virginia Beach; and the Virginia Supreme Court --conspired under colors of state, to deny his request for a Writ of error coram vobis.

15. Whether various persons--including the Commonwealth; the state courts; Commonwealth Attorneys Bob Humphreys, Albert Alberi, and A. Farasahi; Judge Shaddrick; the Circuit Court of the City of Virginia Beach; and the Virginia Supreme Court--who were in a position to correct this wrongful conviction conspired under colors of state to deny my request for a Writ of error coram vobis.

LIST OF PARTIES

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties proceeding in the court whose judgment is the subject of this petiton is as follows:

1) Supreme Court of Virginia

2) Circuit Court of the City of Virginia Beach

3) Judge Shaddrick, Circuit Court of the City of Virginia Beach

4) Commonwealth Attorneys Office, City of Virginia Beach

5) Bob Humphries, Commonwealth Attorney, City of Virginia Beach

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

PETITION FOR WRIT OF ERROR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix page 1 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished

The opinion of the Circuit Court of the City of Virginia Beach appears at Appendix pages 3-28 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished

JURISDICTION

[x] For cases from **state courts**:

The date on which the highest state court decided my case was September 11, 1998. A copy of the decision appears at Appendix 1.

[x] A timely petition for rehearing was thereafter denied on November 6, 1998, and a copy of the order denying rehearing appears at Appendix page 30.

[ ] An extension for time to file the petition for a writ of error certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-_____.

[x] A motion to reconsider a petition for rehearing was filed on the following date November 13, 1998, petition for rehearing was said to be untimely, even though filed in 30 days, and a copy of request appears at Appendix page 29.

The jurisdiction of this court is invoked under 28 U.S.C 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) United States Constitutional Provisions:

U. S Constitution, Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury... nor shall be compelled in any criminal case to witness against himself, nor shall be deprived of life, liberty, or property, without due process of law..."

U. S. Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to ...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..."

U. S. Constitution, Amendment VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...".

U. S. Constitution, Amendment XIV: "... No state shall make or enforce any law which shall abridge any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2) Statutory Provisions:

42 U.S.C.-1983 Civil Action for Deprivation of Rights: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress..."

42 U.S.C.-1985 Conspiracy to Interfere with Civil Rights Depriving persons of rights or privileges (Relevant and Pertinent part): "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a

citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C.-1986 Action for Neglect to Prevent: "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented..."

3) CODE OF VIRGINIA / Statutory Provisions

a.. Title 8.01 - Civil Remedies and Procedure
Chapter 26.2 Appeals Generally - Article 1 - Appeal Bond

8.01-677 - Errors corrected on motion instead of writ of error coram vobis

b. Article 4. Embezzlement and Fraudulent Conversions

18.2-111 Embezzlement deemed larceny; 18.2-111.1

1) Mental element of crime of embezzlement
2) Bona Fide conversion is NOT embezzlement

4) CANONS / Statutory Provisions

a. Canon 5: A Lawyer Should Exercise Independent Professional Judgment on behalf of a Client

b. Canon 6: A Lawyer Should Represent a Client Competently

c. Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

STATEMENT OF CASE

On July 11, 1989 I was convicted in the Circuit Court of the city of Virginia Beach of felony embezzlement. I have continuously fought for almost ten years for my United States and Virginia Constitutional rights to due process. See *Calder v. Bull,* 3 U.S. 38 (1798); *Snyder v. Commonwealth of MA,* 291 U.S. 97 (1934); *Hurtundo v. People of State of California,* 110 U.S. 516 (1884). I was convicted of a crime, which did not exist. I was denied a fair trial due to errors-in-fact, negligence, malpractice and ineffective counsel. *Dobie v. Commonwealth of Virginia*, 96 S.E.2d 747 (1957). I was denied post-trial relief due to admitted negligence of my post–trial attorney.

My trial attorney was a friend of mine from church--a young man who had recently become an attorney. After we spent time together going over my situation and talking about the facts in my case, my attorney assured me the indictment was just a big mistake and he would handle it for me. I placed all my trust in this attorney and followed his advice.

At the time of my arrest and subsequent trial I was

the president of Guardian Services, Inc.(Guardian), located in Virginia Beach, Virginia. I had been president of the corporation for two and one-half years. Guardian, a corporation I started from a God-given vision, provided emergency medical monitoring services for the elderly and infirm. This monitoring provided immediate access to emergency medical services by merely pushing a button on a personal transmitting device. Starting with just a dream to lend assistance to the elderly and infirm, I put together the finest Emergency Medical Rapid Response Program available anywhere in the country. My corporation worked on a shoestring budget for the first two and one-half years during which time I was forming the nucleus of the corporation.

Our corporate structure consisted of a CEO, Board of Directors, and stockholders I had personally selected. Guardian monitored clients throughout Virginia and into parts of North Carolina. To insure effective and prompt service to our clients in a time of need, various representatives from the community, including hospital and emergency medical personnel, assisted in establishing the practices of our firm. We ran a pilot program for two years and provided these services free of charge to those in need of the service but unable to pay. So many people needed the freedom and peace of mind to be able to continue living alone.

For two and a half years prior to my conviction I had turned my salary back into the corporation for growth. Money brought in by the sale of stock was used for operations and other expenses incurred. I personally owed close to $500,000 in personal loans, which I had loaned to the corporation while we were expanding and building our market.

A month before I was arrested I was offered 250,000 dollars for fifty-one percent ownership of the corporation. A friend of mine who brokered businesses had a client who wanted to take over the operations of Guardian. However, I

refused the offer. Although the lump sum of money could have been used to a great advantage to expand the corporation, I did not want to give up control of the corporation. I did not think it was a sound financial decision to sell fifty-one percent since Guardian had over a hundred thousand dollars in corporate assets and the corporation owed virtually no money to anyone except me.

This is all relevant to my case because I had no reason to steal or embezzle any money or equipment from anyone. I had a bona fide claim to all assets in the corporation and this was agreed to by all stockholders. My trial attorney was aware of all this information and this is why he assured me that my case would be dismissed as soon as we got into court.

I relied on my attorney and his knowledge. I did not understand how I could have been indicted over receiving money for the sale of a computer that I owned. There was no embezzlement. There were no grounds for indictment. There never was any intent on my part to take, steal, or embezzle. *Morrissette v. U.S.*, 342 U.S. 246; *U.S. v. Cruikshank*, 92 U.S. 542 (1875). However, based on incorrect and/or incomplete facts presented to the Grand Jury, an indictment was handed down.

On advice of my attorney, I went to Court confident that my case would be dismissed as soon as we got in front of the Judge. I did not take any witnesses to court. My wife was there to support me. While in the courtroom awaiting the start of my case, my wife was told by my case attorney she would have to testify in my behalf. Not until then did my attorney realize my case was actually going to trial and that we had no strategy. I could have presented several witnesses--employees of Guardian, stockholders, members of the Board of Directors, and CEO--to testify in my behalf. Due to ineffective counsel, I did not have that opportunity.

Also while in the courtroom, my attorney told me I was going to have to testify on my own behalf. He also told me not to talk about certain pertinent and relevant facts. He

told me he would resign if I did not do and say what he told me to do and say. Even though I argued and objected to his strategy, I was more afraid of what would happen if I did not follow his advice. I was unprepared, scared, and thoroughly confused by the questions he asked me while I was on the witness stand. I did not know how to answer the questions if I did not say the certain things he told me not to say. I was in shock over the answers he gave to the Court's questions directed to me and which I was not allowed to answer.

My trial attorney deliberately lied to the Court at least once during my trial. I had a judgment placed against me for a personal loan from one of my stockholders. I had borrowed money from them and had agreed to let one of the computers stand for the value of the loan. This stockholder included a lien against one of the computers because they knew that when I closed Guardian all of the assets would convert to me. After agreeing to sell the second computer to the Dosters, I recalled that I had agreed to give the stockholders one of the computers for the value of the loan. When I realized this, I decided to exercise our previously agreed upon option to give the Dosters their money back instead of the giving them the computer. My attorney knew this information. He deliberately lied to the Judge when he said he knew nothing about this issue.

My trial attorney also told the Judge he had only represented me in this matter, and that to was a deliberate lie. In fact, my attorney had represented Robert Barco and me in incorporating the Foresight Foundation, a non-profit organization that provided funds to the indigent in our community. My trial attorney had complete information as to the facts of my personal and business assets along with corporate information, which he needed to incorporate Foresight.

In all pre-trial conversations with my attorney, he assured me this was going to be dismissed when we got to Court. My attorney advised me to waive my right to a jury trial and let the Judge hear my case. Had I known that he

had never even talked to the Commonwealth Attorneys Office nor had he prepared any form of defense on my behalf, I would not have accepted his recommendation.

There were witnesses who should have been in court for questioning by my attorney. Ron Doster knew that I had offered him the money back; he was not even present at the trial. My attorney knew that the testimony given by Ann Doster was tainted with untruthful facts. Yet, my attorney did not challenge her testimony.

To this day, I do not know what caused my trial attorney to do the things he did at my trial. However, I do know that the things he did not do cost me a conviction of a crime I never committed.

I was sole owner of the computer equipment in question. The computer in question belonged to me along with the other computer and many other assets from the corporation. This was due to the monies owed to me from the corporation. When I closed the corporation down, I wanted to make sure the corporation had no outstanding financial obligations before I could or would receive any money from assets. I took care of these responsibilities and obligations.

I had an agreement both verbally and in writing that I could give the Dosters their money or the computer. I offered the money to Ron Doster according to our agreement and he refused to accept the money. He told me he was going to have me arrested and he did. This case, if even a case, should have been civil not criminal. There was no intent on my part to steal or deceive any one out of anything.

Detective Wilson questioned my arrest. He told me he did not know why I was being arrested for this charge. However, he had to do as he was told. He also told the court I had offered him the $1500 to give to the Dosters. He told me during our initial phone conversation that he could not accept it for the Dosters and he would get back with me. When he called me back he told me there was a felony warrant for my arrest.

I know that embezzlement is a crime. I know that stealing is a crime. I know that embezzlement is stealing from some one who has entrusted you, or someone with whom you have a fiduciary role, or employment with and some type of trust relationship when you converted or stole something of theirs for your own personal gain. See *Moore v. U.S.*, 160 U.S. 268 (1895); *General Analytics Corp. v. CNA Insurance Co.* (CA-94-1391-A). I had done none of these and I thought the indictment was a mistake. This is also what my attorney told me and he assured me it would be dismissed when we got to Court.

Ann Doster was employed by and a friend of the Commonwealth. There was no crime committed by me. There was a verbal agreement with changes agreed to by both parties. If there was a breach of agreement, it was when the Dosters' company failed to download software on the agreed upon date. I lived up to the agreement. I offered Ron Doster the $1500 back instead of the computer. The only reason for the indictment was because of Dosters' relationship to Commonwealth. The indictment and warrant was for the embezzlement of $1,500 received by me for a computer I owned. How could I have embezzled it?

I believe that Ann Doster is still employed by the Commonwealth. This could explain why the Commonwealth Attorney and his office conspired to keep me convicted even after he told me personally he would correct this error. Mr. Humphreys told me he knew that I was not guilty of a crime.

The Commonwealth of Virginia, including Commonwealth Attorneys' Bob Humphreys, Albert Alberi, and A. Farasahi, the Circuit Court of the City of Virginia Beach and the Virginia Supreme Court, conspired under colors of state, to deny my request for a Writ of error coram vobis. This act was committed even after an admission by my post-trial attorney of negligence and malpractice to the Virginia State Bar. He admitted this only after he believed there were no more legal remedies for me to pursue. The

BEST AVAI

Attorney General of Virginia, the Supreme Court of Virginia, and the Circuit Court all protected him because he was an ex-state senator and a friend of the Commonwealth and with all the parties involved. When I filed a federal lawsuit showing the conspiracy, they all cried "immunity". However, the Federal District Court ruled that I should be given every opportunity to clear my name and I could seek damages from him after I cleared my name,

I have been forced into slavery by the state and the state courts due to their arrogance. I have been forced to suffer like an animal without my name or my fundamental rights. I went both to Korea and Vietnam to serve my country. What has been taken from me has impacted my family, especially my children. It has forced me to seek medical help for the deprivation of who and what I am. I have lost millions of dollars because my business was taken from me. I cannot get employment because of the severity and nature of what this conviction represents.

In 1993, Commonwealth Attorney Bob Humphreys told me personally that when my case got back to his office he would take care of this conviction because he knew I was not guilty of a crime. He deliberately lied to me. Albert Alberi, A. Farasahi, Judge Shaddrick, the Circuit Court of the City of Virginia Beach and the Virginia Supreme Court, were in a position to correct this wrongful conviction. However, they conspired under colors of state to deny my request for a Writ of error coram vobis.

Both the Circuit Court and the Supreme Court of Virginia had an opportunity to correct this miscarriage of justice when my attorney and I filed malpractice action suit against my post-trial attorney for negligence and malpractice. By his own admission to the Virginia State Bar, he failed to file an Appeal and he did not file a motion to reconsider in a timely manner. This information was also presented when my attorney and myself filed a Habeas Corpus with the Supreme Court of Virginia. The Court refused to hear this petition because I was not incarcerated.

ABLE COPY

I filed a Federal law suit against my post-trial attorney, Moody E. Stallings, et al; the past Attorney General, Mary Sue Terry; the Office of the Attorney General; Governor George Allen; Judge Dixon Foster; the Circuit Court; and, the Supreme Court of Virginia. The lawsuit demonstrated how all had an opportunity to correct this miscarriage of justice and how they had protected my post-trial attorney under colors of state. I lost the case showing conspiracy, only because there was no proof. However, my suit was not ruled frivolous. Now there is proof.

The Commonwealth changed the law thirty-one days after they had been served papers in this case. This change protects negligent defense attorneys who have cost innocent people a wrongful conviction by over zealous prosecutors. With all this history of conspiracy under colors of state, how can the Supreme Court of Virginia have jurisdiction in this case? It is truly in the interest of the court not to see this injustice corrected.

I believe the Appeal process is like a forest without trees. A forest without trees is not a forest. An appeal process without a mechanism for reconsideration is not an appeal process. Regardless of the reason, if pertinent and relevant informations is not presented or is concealed at trial, the defendant does not stand a chance on any type of post-trial relief. Our forefathers were wise and knew this would happen in a justice system where unseen elements could dictate a defendant's right to a fair trial. This is the reason they provided an extraordinary remedy like the Writ of Error coram vobis. Without this remedy, states would do as Virginia has done to me and convict an Innocent man. Due to the ignorance of a defendant regarding proper court procedures and a blind belief in the system in place, defendants put total trust in their attorney to represent them to the highest standards provided by law.

Instead of insuring the highest standards from the lawyers--our alleged "protectors"--we use the method this

country is becoming famous for. We lower the standards and change the laws to protect the ones who fail to perform even to minimum standards. And when convicted of something you did not do, the courts protect the attorneys who have done wrong and not followed the standards set forth in the Cannons.

We allow legislation to change fundamental laws, which protect a person from such a situation. Our courts are backlogged with cases. How many of these cases are false and wrong because incorrect information provided to the Grand Jury resulted being an indictment? How can a one-sided story be used in a case when the fundamental rights of a citizen are in question?. We are innocent until proven guilty, this is the way it should be. However, a prosecutor can serve his or her own agenda behind closed doors, present false information, and get an indictment whether or not a crime has been committed.

A courtroom is a scary place for someone who has been called in to answer for something that someone has accused them of doing. Most of the time a person is unaware of the gravity of the allegations and believes the system will correct the false allegations. This is the way it is meant to be, and the way it should be. This is why we have attorneys to protect our names and our honor when we are innocent.

I have never deliberately cheated anyone in my life. I was working in the community to save lives at the time of this charge and arrest. I was a businessman, not a lawyer. I trusted my lawyer and he failed in his responsibilities. Even after my conviction, I trusted it would be corrected. This did not happen. However, I did not stop believing in our judicial system until I realized that if you ask one hundred attorneys in Virginia what a Writ of error coram vobis is, one hundred of them would tell you they do not know. How can this be ?

The Due Process Clause of the Fourteenth Amendment, adopted in 1868, states "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " The meaning of this passage is that a

state has to use sufficiently fair and just legal procedures whenever it is going to lawfully take away a persons life, freedom or possessions. Thus, before a man can be executed, imprisoned or fined for a crime, he must get a fair trial, based on legitimate evidence, with a jury, etc. These are procedural or "process" rights.

REASONS FOR GRANTING CERTIORARI

The reason this Certiorari should be granted is because I am innocent,

Prior to my trial, I was offered the opportunity to plead guilty to a lesser charge. I was not guilty of a crime and have never deliberately cheated anyone in my life. Believing in the fairness of the Justice system, I declined that offer,

I was denied a fair trial. My counsel advised me incorrectly, did not prepare a defense, lied to the Court, and during the trial threatened to stop representing me if I did not testify according to his instructions,

Due to admitted negligence on the part of my post-trial attorney, I was denied the right to post-trial relief,

Being in a minority of wrongfully convicted Americans, I have been forced into slavery and bondage without chains,

For all of the reasons set forth, I ask the court to please grant this certiorari as soon as possible. I need my name back. My children need my name back. I need to resume a normal life. When my country called, I was there. I served in the U. S. Navy and went to Korea and Vietnam for my country. I am now calling on my country to right a terrible wrong.

I humbly pray that the Supreme Court of the United States will grant me my name and my freedom from this wrongful conviction and tragic injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David K. Fumagalli

Date: 1/19/99

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 11th *day of* September, 1998.

David K. Sumrell,
Appellant,

against Record No. 981471
Circuit Court No. CL97-3228

Commonwealth of Virginia,
Appellee.

Entered: September 11, 1998

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court dismisses the petition for appeal.

A Copy,
Teste,
David B. Beach, Clerk

By: /s/ Wendy L. Tuck
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: 03-12-98
JUDGE:

DAVID K. SUMREL

vs.

COMMONWEALTH OF VIRGINIA

Entered: March 12, 1998

IN RE: PETITION FOR WRIT OF ERROR CORAM VOBIS

ORDER - CASE NO.: C197-3228

This day came A. Farashahi, attorney for the Commonwealth, the petitioner, in person, pro se, on petitioner's motion for Writ of Coram Vobis.

Upon consideration whereof and the Court being of the opinion that said Writ does not lie in this matter.

It is therefore ADJUDGED, ORDERED and DECREED that the petitioner's motion is hereby denied.

ENTERED: 3-12-98

/s/_____
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

DAVID KEITH SUMRELL,

Plaintiff,

v.

MOODY E. STALLINGS, JR.,
MARY SUE TERRY, Former Attorney General,
OFFICE OF THE ATTORNEY GENERAL,
COMMONWEALTH OF VIRGINIA,
DIXON L. FOSTER, Honorable Judge, Retired,
THE SUPREME COURT OF THE
COMMONWEALTH OF VIRGINIA,
RICHARD C. VORHIS, Assistant Bar Counsel,
VIRGINIA STATE BAR,
GEORGE ALLEN, Governor, and
OFFICE OF THE GOVENOR OF THE
COMMONWEALTH OF VIRGINIA,

Defendants.

ACTION NO. 2:97CV115

Entered: September 18, 1997

OPINION AND FINAL ORDER

Plaintiff, proceeding pro se, filed this action under 42 U.S.C. section 1983 and 42 U.S.C. section 1985 to redress alleged violations of his constitutional rights.

Plaintiff raised three separate claims in this suit. First, Plaintiff alleges that he was

wrongfully convicted of embezzlement, and construing the complaint liberally, he seeks to have that conviction vacated under 42 U.S.C. § 1983.[1] Second, Plaintiff alleges that one of the defendants named in this action provided ineffective assistance of counsel in failing to file a timely motion for consideration and

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[1] Courts must construe the pleadings of pro se plaintiffs liberally. See Metals Co. v. FMALI, Inc., 862. 1496, 1498 (E.D. Va. 1994); Vinnedge v Gibbs, 550 F.2d 926, 928 (4th Cir. 1977) (citing Haines v. Kerner, 404 U.S. 519 (1972)). Even giving a liberal construction to Plaintiff's complaint, there are no bases, other than 42 U.S.C. § 1983, upon which Plaintiff could challenge the validity of his conviction at this stage in the proceedings.

Vacating the judgment under Fed. R. Civ. P. Rule 60(b) is not available because the remedy is extraordinary and is invoked only under exceptional circumstances. Dowell v. State Farm Fire and Cas. Auto Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993). Plaintiff has failed to allege exceptional circumstances warranting a vacation of the judgment as described in Rule 60(b). Moreover, a moving party must timely file a Rule 60(b) motion, and Plaintiff failed to satisfy the timeliness requirement.

Relief is not available under 42 U.S.C. § 2254 or 28 U.S.C. § 2241 because Plaintiff does not satisfy the statutory "custody" requirement. For subject matter jurisdiction to exist, the petitioner must be "in custody" at the times he files his habeas corpus application to the district court. Carafas v. LaVallee, 391 U.S. 234, 238 (1968). Similarly, to raise a 28 U.S.C. § 2241 claim, petitioner must be "in custody." An expired sentence does not satisfy the custody requirement. Maleng v. Cook, 490 U.S. 488 (1989); Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982). Here, Plaintiff had finished his five-year probation sentence at the time he filed his complaint. Thus, relief is not available under these statutes.

Relief is not available under the coram nobis statute, 28 U.S.C. § 1651(a). Federal courts may grant a writ of coram nobis to vacate a conviction even after a sentence has been served where fundamental error occurred and no other remedy is available. United States v. Morgan, 346 U.S. 502 (1954); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989); see United States v. Shamy, 886 F.2d 743 (4th Cir. 1989). Here, Plaintiff has failed to allege sufficient facts to support a claim of fundamental error in the proceedings that resulted in his conviction. Thus, relief is not available under 42 U.S.C. § 2241

notice of appeal of the embezzlement conviction, in violation of 42 U.S.C. § 1983.[2] Third, Plaintiff alleges that the eight government defendants violated 42 U.S.C. § 1983 and 42 U.S.C. § 1985 by conspiring to "cover up" the attorney's alleged negligence.

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[2] Plaintiff seeks damages from the attorney, Moody Stallings, Jr., for alleged ineffective assistance of counsel On the face of the pleadings, Plaintiff claims that his cause of action arises under two federal statutes, 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

However, as noted above, see supra note 1, courts must construe the pleadings of pro se plaintiffs liberally. The court declines to construe the plaintiff's pleadings so broadly as to make out a legal malpractice claim brought under 28 U.S.C. § 1332, the diversity jurisdiction statute. Even if the court were to give such a liberal construction to Plaintiff's pleadings, a claim for legal malpractice would be barred by the doctrine of res judicata. The essential elements of res judicata, i.e., a final judgment on the merits in an earlier suit, identity of cause of action, and identity of parties, exist here. See Keith v. Aldridge, 900 F.2d 736 (4th Cir.), cert. denied, 498 U.S. 900 (1990); see also United States v. Sharp, 920 F.2d 1167 (4th Cir. 1990). Plaintiff's claim would also be barred by the doctrine of collateral estoppel, which precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

In the legal malpractice claim brought by Plaintiff against Stallings on May 28, 1993, the Supreme Court of Virginia sustained Stallings' demurrer to the motion for judgment, and the action was dismissed with prejudice. See Sumrell v. Stallings, et al., CL93-1583 (Va. Cir. Ct. 1994). A decision upon a demurrer is but a simple dismissal of the complaint. However, in sustaining defendant's demurrer, the Supreme Court of Virginia decided the case on the merits, holding that the statute of limitations and a release signed by Plaintiff barred the Plaintiff's legal malpractice action.

Although the addition of the words "with prejudice" as contained in the state court final judgment adds nothing to the conclusiveness of the judgement, see Rivers v. Norfolk, Baltimore & Carolina Line, Inc., 210 F.Supp. 283 (E.D. Va. 1962), a state court ruling on a defendant's demurrer to a motion for judgment constitutes a judgment on the merits. Id. Plaintiff's legal malpractice action against Stallings in this court would necessarily raise the same issues raised and decided on the merits in the action brought in state court, and would be barred by res judicata and collateral estoppel.

> The eight government defendants played various roles in a series of legal proceedings brought by Plaintiff challenging his conviction and/or seeking monetary damages from the allegedly negligent attorney. Plaintiff alleges that the government defendants denied him relief in these proceedings in furtherance of a conspiracy to violate his constitutional rights. Plaintiff alleges that each member of the conspiracy was directly or indirectly influenced by the fact that the allegedly negligent attorney served as a Virginia state senator.

Plaintiff seeks injunctive and monetary relief under 42 U.S.C. §§ 1983 and 1985. First, Plaintiff seeks an order from this court vacating his conviction of embezzlement in Virginia state court. Second, Plaintiff seeks 1.5 million in damages from the nine defendants for alleged violations of 42 U.S.C. §§ 1983 and 1985.

At this juncture, the court addresses three issues. The first issue is whether Plaintiff is entitled to a court order vacating his conviction of embezzlement. The second issue is whether defendant Stallings' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative, motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, should be granted. The third issue is whether the court should grant the motion to dismiss filed jointly by the remaining eight defendants (hereinafter "the government defendants") pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

For the reasons discussed below, the Court DENIES and DISMISSES WITHOUT PREJUDICE Plaintiff's petition for an order vacating the conviction of embezzlement. The court hereby GRANTS defendant Stallings' Rule 12(b)(6) motion to dismiss, thereby rendering a decision on his motion for summary judgment unnecessary.

The court hereby DENIES the government defendants' Rule 12(b)(1) motion, and GRANTS the government defendants' Rule 12(b)(6) motion to dismiss.

I. Factual And Procedural History

A. Embezzlement Conviction and Post-Conviction Proceedings

On August 11, 1989, Plaintiff was convicted of felony embezzlement in the Circuit Court of the City of Virginia Beach. He was sentenced to a five-year probation. Plaintiff fired the attorney who had represented him at trial, and retained Moody Stallings, Jr. to file a motion for reconsideration and notice of appeal of the conviction. Stallings filed a motion for reconsideration after the 21-day deadline had passed; the court denied the motion on the grounds that it was time-barred. Stallings fired a notice of appeal of Plaintiff's conviction after the 30-day deadline had passed; the appeal was subsequently deemed untimely and denied.

Plaintiff fired Stallings and retained another attorney, who filed a petition for habeas corpus on Plaintiff's behalf with defendant Supreme Court of Virginia on July 6, 1992. A copy of Plaintiff's habeas corpus petition was served on the Virginia Attorney General's Office, which refused to take action on Plaintiff's behalf. The Supreme Court of Virginia denied Plaintiff's habeas corpus petition on September 22, 1992.

Plaintiff sought a pardon from Virginia Governor George Allen on May 2, 1995. The petition for pardon was denied on November 19, 1996.

B. Prior Actions Involving Defendant Stallings

Plaintiff filed a legal malpractice suit against Stallings on May 28, 1993 in the Circuit Court of the City of

Virginia Beach. Plaintiff alleged that Stallings had failed to file a timely notice of appeal and motion for reconsideration, and that as a result, Plaintiff lost his rights to all post-conviction remedies. Stallings alleged that Plaintiff had retained him after the deadlines for filing a motion for reconsideration and notice of appeal had passed. The Honorable Dixon L. Foster sustained Stallings' demurrer on May 9, 1994.[3] Plaintiff appealed the judgment to the Supreme Court of Virginia, which denied Plaintiff's appeal on October 27, 1994.

Thereafter, Plaintiff reported the alleged negligence of defendant Stallings, and other attorneys not named in the present suit, to the Virginia State Bar Association. On behalf of the Virginia State Bar Association, Assistant Bar Counsel Richard C. Vorhis contacted Stallings requesting various information concerning Plaintiff's allegations of negligence. Based on Stallings' response, it appears that the Bar Association declined to initiate proceedings or take other action against Stallings.

C. Case at Bar

Plaintiff filed a complaint in the U.S. District Court for the Eastern District of Virginia on January 24, 1997. The complaint named nine defendants. In the complaint, Plaintiff stated three claims, for which he sought relief in the form of "appropriate assistance for due process and for clearing my name." Complaint, p. 1. First, Plaintiff alleged that he was wrongfully convicted of embezzlement in the Circuit Court of the City of Virginia Beach. Plaintiff claimed that the conviction was wrongful because he received ineffective assistance of counsel at trial and that he is in fact innocent of the charges. Second, Plaintiff alleged that defendant Stallings provided ineffective assistance of counsel in failing

[3] The Honorable Dixon L. Foster has since retired, and he is correctly named as a defendant in this proceeding as Retired Judge Dixon L. Foster.

to file a timely motion for reconsideration of the conviction and a timely notice of appeal. Third, Plaintiff alleged that the eight government defendants participated in a conspiracy "to protect former [State] Senator Stallings and cover up the mistakes he made." Complaint. p. 1.

On February 14, 1997, defendant Stallings filed an answer to the complaint; a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and supporting memorandum; a motion to dismiss for failure to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, motion for summary judgment pursuant to Fed. R. Civ. P. 56, and supporting memorandum.[4]

Defendant Stallings made several arguments in his answer to the complaint and memoranda submitted in support of his motions. Specifically, the defendant argued that any suit arising out of his alleged negligence was barred by res judicata, the statute of limitations, and a valid release signature by Plaintiff.[5]

On February 14, 1997, the government defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) and a supporting memorandum. The government defendants made several arguments in the memorandum submitted in support of their motion to dismiss. First, the government defendants argued that the district court lacks jurisdiction to review state court proceedings for error, and with regard to defendants Supreme Court of Virginia and Retired Judge Foster, no "case or controversy" existed between the parties. Second, the government defendants argued that at least some of them are entitled to immunity from suit. Third, the government defendants argued that

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[4] Moody Stallings, Jr. is the only defendant not represented by the Virginia Attorney General's Office. He has not joined in any of the pleadings or motions submitted by his co-defendants.

[5] Defendant Stallings also requested a court order directing Plaintiff to pay Stallings' attorney fees and costs incurred in litigating this suit. However, a prevailing defendant in a 42 U.S.C. § 1983 or 42 U.S.C. § 1985 is generally not entitled to this relief. Defendant has not provided any statutory or other basis upon which to grant this requested relief.

Plaintiff has no constitutional right at stake in defendant George Allen's grant or denial of a pardon. Finally, the government defendants argued that Plaintiff did not meet the elements of a 42 U.S.C. § 1985(3) claim.

On March 10, 1997, Plaintiff filed three memoranda. First, Plaintiff filed a response to defendant Stallings' Rule 12(b)(1) motion to dismiss. In his response, Plaintiff argued that diversity jurisdiction was the basis for subject matter jurisdiction in the case at bar, and specified that he seeks $1.5 million in damages from the nine defendants under 42 U.S.C. §§ 1983 and 1985.

Second, Plaintiff filed a response to defendant Stallings' motion to dismiss pursuant to Rule 12(b)(6), or in the alternative, motion for summary judgment pursuant to Rule 56. In his response, Plaintiff reiterated the arguments made in his previous pleadings.

Third, Plaintiff filed a response to the government defendants' motion to dismiss. In his response, Plaintiff first argued that he signed the release with defendant Stallings under duress and therefore the release was invalid. In addition, Plaintiff argued that judicial, prosecutorial, and Eleventh Amendment immunity should not be available in the case at bar because the defendants were dishonest and lacked integrity.

On March 12, 1997, the government defendants filed a reply to the Plaintiff's response. The government defendants in their reply reiterated the arguments made in their earlier pleadings.

On February 27, 1997, Plaintiff moved to amend his complaint. Stallings, the only defendant to object to Plaintiff's motion to amend, filed his objection and supporting memorandum on March 7, 1997. The court granted Plaintiff leave to amend his complaint on May 6, 1997. The amended complaint differed from Plaintiff's initial complaint in several respects. First, Plaintiff amended his complaint to allege diversity jurisdiction. Second,

Plaintiff specified that he seeks $1.5 million in damages under 42 U.S.C. §§ 1983 and 1985.

On May 16, 1997, defendant Stallings filed an answer to the amended complaint, and a motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56, and supporting memorandum.[6] In his answer to the complaint and supporting memorandum, defendant Stallings reiterated the arguments made in his previous pleadings.

On May 27, 1997, the government defendants filed a motion to dismiss the amended complaint and supporting memorandum. In their supporting memorandum, the government defendants reiterated their previous arguments.

On June 3, 1997, Plaintiff responded to defendant Stallings' Rule 12(b)(6) motion to dismiss the amended complaint, or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. In his response, Plaintiff argued that had the defendants properly investigated his allegations of wrongful conviction and ineffective assistance of counsel, the conviction would have been overturned. Plaintiff also argued that the statute of limitations should not bar his claims because congestion in the state court system was the cause of any delays.

On June 10, 1997, Plaintiff responded to the government defendants' motion to dismiss the amended complaint. In his response, Plaintiff argued that the district court must accept jurisdiction in this matter because Plaintiff was wrongfully convicted and he exhausted all state post-conviction remedies.

The matter, fully briefed, is now ripe for decision. Finding oral argument unnecessary to the disposition of the motions, the court will proceed to address them.

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[6] Defendant, Stallings had filed a motion to dismiss the initial complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). However, Stallings did not file a Rule 12(b)(1) motion to dismiss the amended complaint.

I. Discussion

A. Plaintiff's Wrongful Conviction Claim

In his section 1983 claim, Plaintiff alleges that he was wrongfully convicted of embezzlement and seeks an order from the court vacating the conviction. 42 U.S.C. § 1983 provides that

> [e]very person who, under color of any [law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Thus, in order to establish a claim under section 1983, a plaintiff must demonstrate that 1) a person 2) acting under color of state law 3) had deprived him of a right conferred either by the federal constitution or federal statutes.

A section 1983 claim that would "necessarily imply" the invalidity of a conviction or sentence should be dismissed unless petitioner can demonstrate that the conviction or sentence is already invalidated. Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994); see also, Brooks v. Winston-Salem, 85 F.3d 178 (4th Cir. 1996). To recover damages for an allegedly unconstitutional conviction, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, plaintiff must prove that the conviction was (1) reversed on direct appeal, (2) expunged by executive order, (3) declared

invalid by a state tribunal authorized to make such a determination, or (4) called into question by a federal court's issuance of a section 2254 writ of habeas corpus. Heck, 512 U.S. at 477.

Here, Plaintiff has failed to establish that his conviction has been so invalidated, thus Plaintiff's action is not yet cognizable under section 1983. Id. The court hereby DENIES Plaintiff's request for an order vacating his conviction of embezzlement, and Plaintiff's petition is DISMISSED WITHOUT PREJUDICE.[7]

B. Defendant Stallings' Rule 12(b)(6) Motion to Dismiss, or In The Alternative, Rule 56 Motion for Summary Judgment

1. Standards of Review

In deciding a Rule 12(b)(6) motion, the court must accept the factual allegations in the complaint and construe them in the light most favorable to the non-moving party. See e.g., Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979). A motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993), cert. denied, 114 S. Ct. 1307 (1994). Moreover, because plaintiff is proceeding pro se, his complaint, however unskillfully pleaded, must be liberally construed. Vinnedge v. Gibbs,

[7] The court dismisses Plaintiff's petition without prejudice because, if Plaintiff's embezzlement conviction is so invalidated at a later date, Plaintiff is entitled to bring a second section 1983 action based on wrongful conviction. However, any further section 1983 action on this basis without the requisite invalidation will result in sanctions on plaintiff for filing a frivolous lawsuit in this court.

550 F.2d 926, 928 (4th Cir. 1977) (citing Haines v. Kerner, 404 U.S. 519 (1972)).

If, assuming the facts alleged in the complaint to be true, it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations, granting a Rule 12(b)(6) motion is proper. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). A court should not dismiss a complaint even if it appears on the face of the pleadings that the chance of "recovery is remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

In deciding a Rule 12(b)(6) motion, the court may rely only upon the allegations in the complaint and those documents attached as exhibits or incorporated by reference. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Simons v. Montgomery County Police Officers, 762 F.2d 30, 31 (4th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).

Under Rule 12(b) of the Federal Rules of Civil Procedure, when "on a motion asserting the defense numbered (6) for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." Thus, where a trial court grants a motion to dismiss after considering matters outside the pleadings, dismissal is treated as summary judgment. A court cannot require a plaintiff to come forward with evidence in support of complaint, in response to a Rule 12(b)(6) motion, unless the court has notified the plaintiff that it will treat the motion to dismiss as a motion for summary judgment and reach the underlying merits of the complaint. Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462 (4th Cir. 1991).

Summary judgment should be granted under Rule 56(c) Federal Rules of Civil Procedure only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." (emphasis added). Fed. R. Civ. P. 56(c). For the evidence to present a "genuine" issue of material fact, it must be "such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Facts are deemed material if they might affect the outcome of the case. Id.

On a motion for summary judgment, the court reviews the record as a whole and in the light most favorable to the nonmoving party; "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court's role is a limited one: "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. A genuine issue for trial is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." Id. at 250. The party who bears the burden of proving a particular element of a claim must "designate 'specific facts showing that there is a genuine issue for trial'" with respect to that element. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

Summary judgment based on a party's failure to submit affidavits supporting allegations cannot be granted unless the pro se party against whom judgment is to be granted is informed of the right, and given reasonable opportunity, to file counter-affidavits or other appropriate materials. The court should also alert the pro se litigant to the fact that failure to respond might result in entry of summary judgment against him. Roseboro v. Garrison, 528

F.2d 309 (4th Cir. 1975); see Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979).

2. Analysis

In reaching its determination, the court does not need to look any further than Plaintiff's initial and amended complaints and those documents attached as exhibits and incorporated by reference. Accordingly, the court treats defendant Stallings' motion as a motion to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6), rather than a motion for summary judgment pursuant to Fed. R. Civ. P. 56.

Plaintiff must allege that a defendant was a state actor in order to state a claim under section 1983. See Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). Plaintiff alleges that he hired Stallings to represent him in filing a notice of appeal and motion for reconsideration of the embezzlement conviction. It is well-established that a privately retained attorney is not a state actor for section 1983 purposes. See, e.g., Polk County v. Dodson, 454 U.S. 312, 318-319 (1981); Deas v. Potts, 547 F.2d 800 (4th Cir. 1976).[8]

Thus, Plaintiff does not state a cause of action against defendant Stallings under 42 U.S.C. § 1983. Accordingly, the court hereby GRANTS defendant Stallings' Rule 12(b)(6) motion to dismiss with regard to the 42 U.S.C. § 1983 claim.

The court now turns to Plaintiff's 42 U.S.C. § 1985 claim against defendant Stallings. Section 1985 of Title 42 of the United States Code provides:

> [i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of

[8] Plaintiff alleges that defendant Stallings was a Virginia state senator during the period in which he represented Plaintiff. Regardless of whether Stallings was a state official during that time, he was not acting "under color of state law" in his representation of Plaintiff.

> the equal protection of laws, or of equal privileges and immunities under the laws . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

In order to establish a cause of action under section 1985(3), a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985). See also Griffin v. Breckenridge, 403 U.S. 88, 101-103 (1971); Simmons v. Poe, 47 F.3d 1370, 376-77 (4th Cir. 1995).

Here, Plaintiff fails to establish that he is a member of any class protected by the statute, or that the defendants' conduct was motivated by discriminatory animus. Instead, Plaintiff alleges that the defendants' motivation for conspiring to violate Plaintiff's constitutional rights was the fact that defendant Stallings served as a state legislator. Nowhere does Plaintiff allege any discriminatory animus against Plaintiff or members of his class.

Moreover, the law is well-settled that to prove a section 1985 conspiracy, a claimant must show an agreement or a "meeting of the minds" by defendants to violate the claimant's constitutional rights. See Caldeira v. County of Kauai, 866 F.2d 1175, 1181 (9th Cir. 1989), cert. denied, 493

U.S. 817, 110 S. Ct. 69, 107 L.Ed. 2d 36 (1989); see also Lenard v. Argento, 699 F.2d 874, 882-83 (7th Cir. 1983), cert. denied, 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983). The Fourth Circuit has repeatedly stressed the need for specific allegations supported by concrete facts to make out a civil conspiracy. See, e.g., Hinkle v. City of Clarksburg, W.Va., 81 F.3d 416, 422-23 (4th Cir. 1996); Gooden v. Howard County, 954 F.2d 960 (4th Cir. 1992) (en banc); Simmons, 47 F.3d at 1377. Here, Plaintiff states only conclusory allegations that the defendants participated in a conspiracy, and the allegations do not establish the requisite "meeting of the minds."

Thus, Plaintiff has failed to state a cause of action under 42 U.S.C. § 1985. The court hereby GRANTS defendant Stallings' motion to dismiss for failure to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6) with regard to Plaintiff's 42 U.S.C. § 1985 claim.

C. Government Defendants' Rule 12(b)(1) Motion to Dismiss

1. Standard of Review

The government defendants have moved to dismiss this case on the grounds that the court has no jurisdiction over the subject matter of the case.

A federal court must have subject matter jurisdiction over a lawsuit in order for the court to have the power to award relief. First. Am. Nat'l Bank v. Straight Creek Processing Co., 756 F. Supp. 945, 946 (E.D. Va. 1991). A federal court has federal question subject matter jurisdiction when the civil action "aris[es] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

The burden is on the plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir.

1982). Where the party asserts federal question jurisdiction, the burden is on that party to show that a substantial federal question exists. Goldsmith v. Mayor of Baltimore, 845 F.2d 61 (4th Cir. 1988). A claim is insubstantial if it is obviously without merit or clearly foreclosed by authoritative precedent. Hagans v. Lavine, 415 U.S. 528 (1974); Crosby v. Holsinger, 816 F.2d 162 (4th Cir. 1987).

It is appropriate, in weighing jurisdictional facts, for the court to consider the pleadings, along with affidavits and other supporting materials submitted by the parties without converting the motion to one for summary judgment. See Abel v. Montgomery Ward Co., Inc., 798 F. Supp. 322, 324 (E.D. Va. 1992). The plaintiff is entitled, however, to favorable inferences from the pleadings, affidavits, and documents submitted on the issue. Reynolds Metals v. FMALI, 862 F. Supp. 1496, 1498 (E.D. Va. 1994); Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582, 588 (E.D. Va. 1992).

In assessing Plaintiff's allegations of subject matter jurisdiction, the court should be solicitous of pro se complaints, regardless of how unartfully the pro se plaintiff has drafted the complaint. See Haines v. Kerner, 404 U.S. 519, 520 (1972); Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977); Metals Co. v. FMALI, Inc., 862 F. Supp. 1496, 1498 (E. D. Va. 1994).

One way in which a Rule 12(b)(1) motion may attack the complaint on its face is by asserting simply that the complaint "fails to allege facts upon which subject matter jurisdiction can be based." Adams, 697 F.2d at 1219. If such is the case, "the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under Rule 12(b)(6) consideration." Id.

Because the trial court's jurisdiction, "its very power to hear the case," Mortensen Co. v. First Fed. Savings & Loan Assoc., 549 F.2d 884, 891 (3d Cir. 1977), is at issue in such a Rule 12(b)(1) motion, the trial court is free to weigh

the evidence to determine the existence of its jurisdiction. Adams, 697 F.2d at 1219; Mortensen, 549 F.2d at 891.

2. Analysis

Plaintiff in his amended complaint alleges that the government defendants violated two federal statutes, 42 U.S.C. § 1983 and 42 U.S.C. § 1985. As the Fourth Circuit Court of Appeals noted in Weller v. Dep't of Soc. Serv. for Baltimore,[9] "[f]ederal jurisdiction may not be premised on the mere citation of federal statutes.[10]

However, Plaintiff here sufficiently alleges that defendants violated his constitutional right to due process in the various proceedings following his embezzlement conviction. Construing the complaint liberally, Plaintiff alleges a violation of his due process rights under the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV.

The federal question jurisdiction statute, 28 U.S.C. § 1331, provides that such jurisdiction exists where a civil action "arises under Constitution, laws, or treaties of the United States." Plaintiff here has sufficiently alleged that defendants conspired to deprive him of his federal constitutional rights. Taking all of Plaintiff's allegations as true, this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Accordingly, the court DENIES the government defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

D. Government Defendants' Rule 12(b)(6) Motion to Dismiss

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[9] 901 F.2d 387 (4th Cir. 1990).
[10] Id. at 391.

1. Standard of Review

In deciding a Rule 12(b)(6) motion the court must accept the factual allegations in the complaint and construe them in the light most favorable to the plaintiff as the non-moving party. See, e.g., Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979). A motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and which would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993) cert. denied, 114 S. Ct. 1307 (1994). If, assuming the facts alleged in the complaint to be true, it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations, granting a Rule 12(b)(6) motion is proper. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). A court should not dismiss a complaint even if it appears on the face of the pleadings that the chance of "recovery is remote and unlikely." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

2. Analysis

Plaintiff brought this cause of action against the eight government defendants pursuant to two federal statutes, 42 U.S.C. § 1983 and 42 U.S.C. § 1983.

As a threshold issue then, the court must determine whether the eight government defendants are "persons" within the definition of § 1983. The definition of "person" for the purposes of § 1983 has been thoroughly treated in the case law. As an overarching principle, the U.S. Supreme Court has stated that "neither a State nor its officials acting in

their official capacities are 'persons' under § 1983." Will v. Michigan Depot of State Police, 491 U.S. 58, 71 (1989). Will does not preclude personal capacity suits against state officials, see Goodman v. Rockefeller, 947 F.2d 1186 (4th Cir. 1991), and a plaintiff filing a section 1983 complaint need not expressly plead that he is suing state officials in their individual, rather than official, capacities. Biggs v. Meadows, 66 F.3d 56 (4th Cir. 1995)

The court must look to the substance of the complaint, the relief sought, and the course of the proceedings to ascertain the nature of plaintiff's claims. Id. Liability under section 1983 turns on the capacity in which the state official is sued and not the capacity in which they acted when they allegedly injured the plaintiff. Hafer v. Melo, 502 U.S. 21 (1991).

Absent waiver or consent, see Moreno v. University of Maryland, 645 F.2d 217 (4th Cir. 1981), aff'd, 458 U.S. 1 (1982), the Eleventh Amendment bars suits directly against state or its agencies, regardless of the nature of the relief sought. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). The Eleventh Amendment bar is effective whether the state is named party or party in fact. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). The determination that a state treasury will be liable for judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity. Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

If the state treasury will not be affected, then availability of immunity for single state entities must be determined by resort to other relevant considerations, chief among which are whether the suit will jeopardize the integrity retained by the state in the federal system and whether the state possesses such control over the entity relevant that it can legitimately be considered an arm of the state. Id. Other factors relevant to whether a state-created entity constitutes state agency which is immune from liability are involvement in local versus state concerns and treatment under state law. Ram Ditta v. Maryland Nat'l

Capital Park & Planning Comm'n, 822 F.2d 456 (4th Cir. 1987).

a. State Agency Defendants: Office of the Attorney General, Supreme Court of Virginia, and Office of the Governor

Three of the government defendants named in the case at bar are state agencies that are immune from suit under the Eleventh Amendment: the Office of the Attorney General, the Supreme Court of Virginia, the Office of the Governor. Each of these agencies is entirely funded by the state, any judgment rendered against them in a section 1983 suit would be paid out of the state treasury. Thus, these government defendants are not "persons" for section 1983 purposes and are entitled to Eleventh Amendment immunity.

Moreover, in Monell v. New York City Department of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L.Ed. 2d 611 (1978), the U.S. Supreme Court held that official policy must be "the moving force of the constitutional violation" in order to established the liability of a government body under section 1983. See Rizzo v. Goode, 423 U.S. 362, 370-77, 96 S. Ct. 598, 603-607, 46 L.Ed.2d 561 (1976). Here, Plaintiff fails to allege any policy of the three state agency defendants that arguably violated his due process or other federal constitutional rights. Thus, these government bodies cannot be liable to Plaintiff for monetary damages under section 1983.

b. Defendant Foster

Defendant Retired Judge Dixon L. Foster is entitled to immunity from suit under section 1983. Judges are immune from damages liability under section 1983 for judicial acts unless done in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978); see Pierson v. Ray, 386 U.S. 547 (1967). Immunity is not lost because action was taken in error, done maliciously, or

exceeded authority. Stump, 435 U.S. at 356; Chu v. Griffith, 771 F.2d 79 (4th Cir. 1985).

Here, Plaintiff fails allege sufficient facts indicating that defendant Foster's ruling in the state court proceeding was rendered in clear absence of all jurisdiction. A ruling in a case properly before the court is inarguably a "judicial act" triggering the immunity doctrine. Thus, defendant Foster cannot be held liable to Plaintiff for monetary damages under section 1983, and is entitled to immunity under the judicial immunity doctrine.

c. Defendant Mary Sue Terry

A prosecutor is a quasi-judicial officer who enjoys absolute immunity when performing prosecutorial, as opposed to investigative or administrative, functions. Imbler v. Pachtman, 424 U.S. 409 (1976). The decision as to "whether and when to prosecute" is "quasi-judicial," so as to provide a prosecutor with absolute immunity. Lyles v. Sparks, 79 F.3d 372 (4th Cir. 1996).

Here, Plaintiff alleges that Mary Sue Terry refused to prosecute defendant Stallings for his alleged negligence due to an improper motive. However, the Office of the Attorney General owed no duty to Plaintiff to investigate his embezzlement conviction or the alleged negligence of defendant Stallings.[11] Moreover, under the prosecutorial immunity doctrine, Plaintiff may not recover damages from defendant Terry under section 1983, and Terry is entitled to prosecutorial immunity.

d. Defendants Virginia State Bar and Richard C. Vorhis

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[11] Defendant Terry cannot be held liable for the actions or inaction of other persons in the Office of the Attorney General. It is well-settled that the doctrine of respondeat superior liability cannot serve as the basis for liability under section 1983. See e.g. Monell v. Department of Social Services, 4376 U.S. 658, 691 n. 58 (1978).

Assuming arguendo that the Virginia State Bar Association and its employees are sufficiently independent of the state so as not to enjoy Eleventh Amendment immunity,[12] Plaintiff has failed to meet the elements of a section 1983 cause of action with regard to these defendants.

To allege a cause of action under 42 U.S.C. § 1983, Plaintiff must establish that he was deprived of a federal constitutional or statutory right by a person and that such person was acting under color of state law. 42 U.S.C. § 1983. Here, Plaintiff alleges that defendants State Bar Association and Vorhis did not take disciplinary action against defendant Stallings due to improper motive, and thereby violated Plaintiff's due process rights. However, Plaintiff had no property, life or liberty interest at stake in these defendants' action or inaction involving defendant Stallings.

As the government defendants correctly noted in their supporting memorandum, Plaintiff's position is analogous to that of a complainant in a criminal prosecution: "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Even if the defendants were acting under "color of state law," Plaintiff has failed to meet the first element of a section 1983 suit.

Thus, Plaintiff has failed to establish a cause of action against defendant State Bar Association and defendant Vorhis.

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[12] Other jurisdictions have recognized that officials charged with duties involving attorney discipline enjoy an absolute quasi-judicial immunity, see, e.g., Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983). The U.S. Court of Appeals for the Fourth Circuit has not addressed the issue.

e. Governor Allen

Qualified immunity shields from civil damages liability government officials performing discretionary functions so long as the officials' conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The principle of qualified immunity reflects the concern that civil damages award against public officials for every judicially determined violation of constitutional rights would prove too expensive to the public, discourage public service employment, and impair government decision-making. Id. at 814, 102 S. Ct. at 2736.

Here, Plaintiff alleges that defendant Allen denied his petition for a pardon because the defendant was improperly influenced by defendant Stallings' status as a state politician. The grant or denial of a petition for pardon is an entirely discretionary function. In Connecticut State Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the Court held that where state law granted unfettered discretion to the State Board of Pardons, the Board had no duty to explain the reasons for its decisions or follow any prescribed procedures in making its decisions. Id. at 476-77. No right was conferred "beyond the right to seek commutation." Id.

Plaintiff fails to allege any facts indicating that in denying Plaintiff's petition, the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Thus, Plaintiff fails to state a cause of action under 42 U.S.C. § 1983 with regard to defendant Allen.

Thus, the court concludes that Plaintiff has failed to state a cause of action under section 1983 against the eight government defendants. Accordingly, the court hereby GRANTS the government defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) with regard to Plaintiff's section 1983 claim.

The court now turns to Plaintiff's section 1985 claim against the government defendants. As noted above, see supra Part IIB, in order to establish a cause of action for "conspiracy to deny equal protection of the laws" under section 1985(3), a plaintiff must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiffs as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985). See also Griffin v. Breckenridge, 403 U.S. 88, 101-103 (1971); Simmons v. Poe, 47 F.3d 1370, 1376-77 (4th Cir. 1995).

Here, Plaintiff fails to allege racial animus or membership in a class protected under 42 U.S.C. § 1985. Moreover, Plaintiff fails to establish the existence of a conspiracy. A court should liberally construe pro se complaints but does not act as advocate. Weller v. Department of Social Servs., 901 F.2d 387 (4th Cir. 1990). Plaintiff's complaint fails to allege anything that even remotely suggests a factual basis for his claim of conspiracy among the defendants. While pro se complaints may "represent the work of an untutored hand requiring special judicial solicitude," a district court is not required to recognize "obscure or extravagant claims defying the most concerted efforts to unravel them." Beaudell v. City of Hampton, 775 F.2d 1274, 1277 (4th Cir. 1985), cert. denied, 475 U.S. 1088, 106 S. Ct. 1475, 89 L.Ed.2d 729 (1986).

Thus, Plaintiff fails to state a cause of action against the government defendants under 42 U.S.C. § 1985. Accordingly, the court hereby GRANTS the government defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) with regard to Plaintiff's section 1985 claim.

III. Conclusion

The court hereby DENIES and DISMISSES WITHOUT PREJUDICE Plaintiff's petition for an order vacating the conviction of embezzlement. The court hereby GRANTS defendant Stallings' Rule 12(b)(6) motion to dismiss. The court hereby DENIES the government defendants' Rule 12(b)(1) motion, and GRANTS the government defendants' Rule 12(b)(6) motion to dismiss.

Plaintiff is ADVISED that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, VA 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to send a copy of this Opinion and Final Order to plaintiff and counsel for defendants.

IT IS SO ORDERED.

/s/_____
Rebecca Beach Smith
United States District Judge

Norfolk, Virginia
September 18, 1997

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 2nd *day of* December, 1998.

David K. Sumrell,
Appellant,

against Record No. 981471
Circuit Court No. CL97-3228

Commonwealth of Virginia,
Appellee.

Entered: December 2, 1998

Upon a Petition for Rehearing

On November 16, 1998 came appellant, in proper person, and filed a motion to reconsider the petition for rehearing in this case.

On consideration whereof, the Court denies the motion.

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 6th *day of* November, 1998.

David K. Sumrell,
Appellant,

against Record No. 981471
Circuit Court No. CL97-3228

Commonwealth of Virginia,
Appellee.

Entered: November 6, 1998

Upon a Petition for Rehearing

Finding that the petition for rehearing was not timely filed, the Court dismisses said petition as late.

A Copy,
Teste:

/s/ David B. Beach
Clerk

David K. Sumrell
9300 Gilead Hill Court
Charlotte, North Carolina 28078
Phone 1 (800) 418-1639
Home Phone (704) 948-6725
Email davidsumrell@msn.com

March 1, 1998

Judge Moore
Virginia Beach Circuit Court
City of Virginia Beach
2305 Judicial Blvd.
Virginia Beach, Virginia 23456

Dear Judge Moore,

This letter is to let you know, what I have had to go through and about the way the Commonwealth Attorney's office and Mr. Alberi have handled my Case, Sumrell vs. Commonwealth.

In December of 1997 the Court ordered me to serve papers to the Commonwealth Attorney's office and have a hearing date set, as of today there still has not been a dat set and after last weeks demonstration by Mr. Alberi of word and honor. I have been forced to re-evaluate my position and not to expect fairness or integrity from the Commonwealth's Attorney's office.

I called Mr. Alberi's office on February 18, 1998 and again requested a Hearing Date and I was told Mr. Alberi was in a metting and Ms. Barnes said she would let Mr. Alberi know I called and he would get back to me that afternoon. Ms. Barnes called my voice mail and said Mr. Alberi had left for the day and he wouldn't be back until February 22, 1998 and Ms. Barnes said Mr. Alberi would get with me on February 22nd or February 23, 1998. I sent the

Commonwealth Attorney's office an E-mail confirming with Ms. Barnes had told me.

Ms. Barnes called me on Monday, February 22, 1998, after I sent the Commonwealth Attorney's office a confirmation E-mail on Sunday February 21, 1998. Ms. Barnes called my voice mail and said that Mr. Alberi was sick and she said, Mr. Alberi said, he would set a hearing date as soon as he got back in the office. She said on Tuesday afternoon that Mr. Alberi should be in Wednesday and He would set a date on Wednesday or Thursday at the latest.

I drove into Virginia Beach, from North Carolina on Thursday, February 25, 1998 to confront Mr. Alberi on why I still do not have a Hearing Date. Mr. Alberi would nto even have the respect to see me for 5 minutes, even after I tried to wait. I took my father with me so I would have a witness to these events which would happen. When I asked to see Mr. Alberi, I was asked if I had an appointment and I said no, but he'll know why I am here. She went and talked to Mr. Alberi and I could see them both and could be seen and Mr. Alberi told her to tell me he had an important meeting and he would not see me. I asked to see Mr. Humphreys and I was told he was in the same meeting. I then asked could I wait and the receptionists said yes, relunctantly.

After sitting there for three for four minutes we heard everyone singing Happy Birthday to someone. We waited a while longer and I asked to speak to Ms. Barnes and the receptionists said she would try to find her. From the back room I heard Ms. Barnes ask "what do you want me to tell him, he's out there waiting" and then Ms. Barnes came out and told me Mr. Alberi was tied up and could not see me and then when I asked could I wait and see him later she said he would not see me. I told Ms. Barnes that Mr. Alberi did not have to see me, just live up to his word and set a hearing date. I told Ms. Barnes if Mr. Alberi did not set a Hearing

Date like he had promised, I was coming back on Friday and wait, I told Ms. Barnes we heard how important singing Happy Birthday was and I told her how disappointed I was in the way Mr. Alberi had treated me and why he could not take the time to see me, even after Mr. Alberi had promised me a hearing date by February 22nd or 23rd 1998.

After, all I have been through in regards to my **Wrongful Conviction**, I have never held any anger or resentment towards the Court or the members of the court. I have always believed those who represented the law were honest and true to your word. I thought they believed in Justice. However, now through the false statements made to me, through the Commonwealth Attorney's office, made by Mr. Alberi, I have been forced to look at how Mr. Alberi has stalled for almost three months keeping me convicted of this Wrongful Conviction.

This to me is Cruel and Unusual Punishment and I believe my Right to a speedy trial has been violated, I intend to use every measure of the law to hold the Commonwealth Attorney's office liable for your lack of professionalism, and even possible negligence in this matter.

PETITION
for
WRIT OF ERROR CORAM VOBIS

Writ of Error CORAM VOBIS. For any clerical error or error in fact, for which judgement may be reversed or corrected on writ of error CORAM VOBIS, the same may be reversed or corrected on motion, after reasonable notice by the court.

There are two basis for this writ if error CORAM VOBIS, 1) **Wrongful Conviction** 2) **Ineffective Counsel[s]**

Wrongful Conviction

There was no crime of embezzlement or larceny or misappropriation nor any **Intent** on my part to do so. I was the **sole owner** of the property in question. I had not in any way tried to cheat anyone. I did not have the goods of another. This was an oral agreement with a hand shake to sell my computer. There was software that had to be removed before the sale could be final. There were changes made in the oral agreement even after I received the Certified letter. I was told by my lawyer[s] this case this would be dismissed as soon as we got in front of a Judge. There were witnesses who could have testified on my behalf. I had an agreement: I could sell them the computer or give them their $ 1500.00 back. I offered the money back on three separate occasions, two different people and times prior to arrest warrant being issued. I had put my trust in my lawyer[s] and he was wrong.

Both Federal and State laws require the basic elements of **INTENT, EMPLOYMENT** or **TRUST RELATIONSHIP**, and **CONVERSION**, for one's own use for a conviction of embezzlement..

Not one of these elements, even comes close to being met.

a) Intent-

(attachment-1) Morissette v. United States shows it is essential.

(attachment-2) U.S. v. Cruikshank

b) Trust Relationship-

(attachment-3) Moore v. United States

(attachment-4) Field v. United States

c) Conversion-

(attachment-5) U.S. v. Timothy Walker

(attachment-6) U.S. v. Shirley Mackey

(attachment-7) John R. Yarnevic v. Brinks Incorporated

(attachment-8) General Analytical Corporation v. CNA Insurance Companies, d/b/a

Ineffective Counsel

I was convicted of a crime which did not exist, which had none of the essential elements of embezzlement and I was still convicted.

I have been denied due process and both my Federal and State Constitutional Rights have been denied. Due process is one of my Fundamental Rights given under both the United States and the Virginia Constitutions. See (attachments 9,10, 11, 12, 13 and 14). If I had not been denied due process, this Wrongful Conviction would have been overturned in the Virginia Court Of Appeals. Post Trial Relief failed when papers for motion for reconsideration was

mis- filed by attorney, and who never filed an appeal on my behalf even after he was paid $ 3000.00 to do so.

Writ of Error CORAM VOBIS. For any clerical error or error in fact, for which judgement may be reversed or corrected on writ of error CORAM VOBIS, the same may be reversed or corrected on motion, after reasonable notice by the court. (attachment 15) Dobi v. Commonwealth. (attachment 16) **Writs,**. See Federal rulings (attachments 17, 18, 19 and 20) .

During trial I believe my attorney became intimidated by the judge and failed to introduce facts and failed to question the witnesses on answers he knew were incorrect. We had been in the court for hours and after the last trial, another drug "sweet deal" by the commonwealth attorney, the judge became angry at the commonwealths' crap and this is when my attorney looked at my wife and I, after my case was called and said "you might get convicted of this", the trial transcript (attachment 21) shows that there was confusion in the court room, due to questions my attorney was asking me. I know I was scared and confused after his statement. He even told the court that this was the first time he represented me and that was untrue, because in August in of 1988 he helped me incorporate The Foresight Foundation, Inc. in the state of Virginia, I'm sure it was a mistake, but shows my attorneys' frame of mind after he became scared of the judges anger, demonstrated earlier.

History of Conviction

The first attorney was **Henry Thompson**, who in 1988 or early in 1989, I retained to go into court and represent me in a felony embezzlement charge in the General District Court. He went over the evidence and told me that this was a mistake and he would represent me for $700 dollars which I thought was very reasonable. The day before court we got together and went over every thing again and

we agreed to be in court early so that if there was anything else we had to go over we could. My wife and I got to court at 8:00 am and we waited for Henry Thompson to join us, we never saw him until after the judge had called my case and I had to advise him that my attorney was not here yet, the judge got angry and agreed to give a little more time.

When Henry finally got there he told me that he had to talk to me and called me out in the hall and told me that I was going to have to plead guilty and take a mis-demeanor charge, what he called the confederate statue rule. This sent me into a panic situation and I asked him why, I asked him was this what he recommended and he said yes. I asked him why I had to plead guilty to a crime that I had not committed. He told me that if I did not accept this he was not going to represent me, I told him that I could not understand this and that I had to speak to my wife and see what she thought. After talking to my wife I told him that I was not ready to do this yet, we went up in front of the judge and he re set my trial for the next week. I confronted Henry again as to why all of a sudden this charge that was not right, I had to plead guilty. After telling Henry that I did not agree and that I knew something stunk, after seeing him be buddy, buddy with the common wealth attorney,

Henry finally told me that the common wealth attorney had promised him some favors if he would get me to accept a lower charge conviction. I immediately told him he was fired and that I could not understand his actions.

When I went back to court to pay restitution and to decline the offer that **they** had agreed on. Henry was there and when I was called up, I told the Judge that I was not going to accept a conviction for something I had not done, Henry stepped up and told the judge that he resigned from the case and told me, I had waived my right for a lower court hearing because I would not accept the conviction. I had originally given Henry Thompson $500.00 of the $700.00 and I still owed him $200. dollars, he never even asked for the remaining balance.

The second attorney was **Andrew Protogyrou** who was a friend and we went to church together, he looked at the charges and said that he would represent me because he felt this was just a mistake and at best he said this was a civil matter. He said that this would be dismissed as soon as it got in front of the judge. We went to court, my wife and myself and my attorney, **we took no other witnesses or anyone on my behalf**. when the judge found me guilty of embezzlement, Andy looked at me and said what did I do wrong and my wife told him that I was not able to talk. Andy immediately asked for an appeal and the judge told him to wait until the pre sentencing report was finished before he asked for the appeal. After about a week or ten days I called Andy and asked him about the appeal and he told me that he saw no grounds for an appeal, because he said he had done nothing wrong and I was going to have to face the fact that I was convicted and there was nothing else that could be done. I told him he was wrong and that with his arrogant attitude, I was going to talk to someone else to see what could be done to correct this terrible mistake. I also fired him for his attitude.

After my conviction, I retained a prominent attorney **Moody Stallings** who looked at the transcript of the trial and stated in writing this was the weakest case he had ever seen. He told me he would file for reconsideration or an appeal and get this corrected. My attorney was a State Senator who had legislative responsibilities to fulfill; therefore, it took almost a year to actually get back into court. When we got into court, the judge stated that he had no jurisdiction in this matter. My attorney had not filed the required papers within 21 days--he filed on the 27th day. In addition, he never filed an appeal, either. I was denied due process because my attorney did not file the correct paperwork in a timely manner. After he failed to perform his duties, I was required to sign a release in order to get my money back and get even another attorney.

I then retained another attorney, **Marvin Miller** who

filed a *writ of habeas corpus* in the Virginia State Court Of Appeals. After almost another year, we were notified that our request was turned down. After paying this attorney nearly $10,000 dollars, he told me that he never thought we would get relief because the courts hear only a few of the cases filed. As I uncovered at a later date, the law regarding a *habeas corpus* had been changed in 1986; they only apply to persons who are incarcerated. The information presented in the *habeas corpus* was accurate and complete. However, since I was not incarcerated, it was never read by the Court.

This whole mis-carriage of justice centers on a trust relationship between a defendant and his attorney, foremost to guide client or defendant through the legal confusion and fear in any type of legal action, and to represent defendant and defendants interest. This truly has been a joke in my situation.

As the court can tell this has been a long and drawn out saga and has cost me eight years of freedom and many other things. Through all of this I have never given up on our Judicial System and the fact that truth will win out in the end.

I humbly request the Court look at the level of injustice I have suffered and grant me my freedom and my life back--a man without a name is not a man. These cases leave little doubt to the need for the essential elements for embezzlement. I contend that a fundamental error was made with this conviction and, but for the denial of due process, the conviction would have been overturned, Please help me to put this eight year old nightmare to rest and restore my name and honor back to me.

The hardest thing for me in this whole ordeal is that this WRIT OF ERROR CORAM VOBIS has been available the whole time, how can this level of incompetence be allowed and tolerated in our judicial system.

I declare the above statements to be true and accurate under penalty of perjury.

/s/David K. Sumrell

IN THE CIRCUIT COURT OF VIRGINIA BEACH
JUDICIAL CENTER- BUILDING 10-B
2305 JUDICIAL BOULEVARD
VIRGINIA BEACH, VIRGINIA
23456-9017

David K. Sumrell

vs.

Commonwealth of Virginia

CASE NO: C197-3228

Petition
for
Motion to Reconsider

On March 12, 1998, the Honorable T. S. Shadrick of the Circuit Court of the City of Virginia Beach adjudged, ordered, and decreed that my motion for a Writ of Coram Vobis be denied because "said Writ does not lie in this matter". I, David Keith Sumrell, coming before the Court as a Pro Se litigant, humbly request that the Court reconsider my Writ of error coram vobis.

A Writ of error coram vobis lies for an error of fact which is not attributable to the applicant's negligence and which, if known by the Court, would have prevented rendition of the judgment. (Dobi vs. Commonwealth). There were errors in fact with regard to my original trial on July 11, 1989. Pertinent facts were not revealed and if these facts had been known by the Court, I would not have been convicted of felony embezzlement. I filed a Writ of error coram vobis to bring to the Court's attention these errors and for the judgment to be reversed or corrected.

I ask the Court to forgive my lack of expertise in presenting the Error(s) in Fact on March 12, 1998. At that

proceeding, the Commonwealth's attorney stated that I filed a Writ of error coram vobis because of a clerical error and because of ineffective counsel. The fact is that I filed a Writ of coram vobis due to **errors in fact**. I beg the Court's mercy in reconsidering my Writ of error coram vobis. But not for the errors in fact at my original trial in 1989, the truth would have surfaced, and I would not have had to suffer under a wrongful conviction for nearly nine years.

Errors in Fact

There are at least three areas in the original trial transcript where errors in fact occurred.

1) It was not revealed at the trial that the computer in question belonged to me. I had full authority to sell the computer. The agreement to sell the computer to American Computer Enterprises was a simple handshake agreement between myself and Ann Doster.

At the time of this handshake agreement, I was in the process of closing down the operations of Guardian Services, Inc. (hereafter referred to as Guardian). Since its inception and incorporation by me, Guardian had never been solvent. I had borrowed money from stockholders and created personal notes from private sources in an effort to keep Guardian operational. I had personally loaned the corporation over $60,000 and in the two and one-half years prior to my conviction, I was not paid any portion of my annual salary of $52,000. At that time, Guardian owed me approximately $200,000. I had a documented and bona fide claim to any of the assets of the corporation.

While on the witness stand during the trial, I was asked by the Court if Guardian was solvent enough to meet its expenses. (Refer to page 55, beginning with line 5 of the trial transcript.) My counsel attempted to answer the question. I was not allowed to answer the question. My answer could have clearly presented for the Court the

following facts:

a. I had sole ownership rights to the computer by virtue of monies owed to me, not by virtue of employment by Guardian, and

b. I owned fifty-one percent of the corporation. When I agreed to sell the computer to American Computer Enterprises, the bank account for Guardian had been closed out. The money received from Ann Doster for the computer was used to satisfy corporate debts.

2) After agreeing to sell the computer to American Computer Enterprises, it came to my attention that another party (Carl and Deloris Myer) had placed a judgment against me for $3,000 to insure payment of a personal loan I had obtained from them. They had put a lien on one of the computers owned and used by Guardian. Not sure of which computer they had placed a lien against and intending to do nothing improper, I contacted American Computer Enterprises. I discussed the situation with Ann Doster and told her that I would need to exercise my option, as presented in both a letter I had received from her and as agreed to orally, of returning the $1,500. I attempted to pay both Ann Doster and Ron Doster. Neither of them would accept the money.

Referring to the trial transcript on page 60, beginning with line 2, it is not clear why I determined that I should return the $1,500 to American Computer Enterprises instead of delivering the computer. It was not clear to the Court that I believed I could not deliver the computer in question to Ann Doster and that I offered to return the money. I had a letter from Ann Doster indicating that I could **either** deliver the computer **or** return the money. However, payment of the money had been refused by the Dosters and by the police detective representing the City of Virginia Beach in this matter.

3) None of the essential elements for embezzlement were

present. The elements of embezzlement include: conversion of personal property of another by one who has acquired lawful possession with an intent to defraud the owner.

I filed a Writ of error coram vobis because of substantial errors of fact in my trial in 1989. Since the conviction, I have been denied my rights "Due Process" as provided for in the Constitutions of both the Commonwealth of Virginia and the United States. I humbly and respectfully pray the Court to show Mercy and evaluate this Motion to Reconsider and grant my Writ of error coram vobis. Please help me to correct an injustice, which I have been fighting for almost nine years. I have been forever Damned, under a Wrongful Conviction. I have tried to keep my faith and hope, that this nightmare will end soon.

I affirm under oath that the above statements are true and accurate, under the penalty of perjury.

/s/David K. Sumrell

David K. Sumrell
9300 Gilead Hill Court
Charlotte, North Carolina 28078
Phone 1 (800) 418-1639
Home Phone (704) 948-6725
Email davidsumrell@msn.com

November 13, 1998

IN THE SUPREME COURT OF VIRGINIA
David B. Beach, Clerk
Supreme Court Building
100 North 9th Street, 5th Floor
Richmond, Virginia 23219

Re: David K. Sumrell v. Commonwealth of Virginia
Record No. 981471

MOTION TO RECONSIDER

PETITION FOR REHEARING EN BANC

Dear Ms. Krueger,

Attached is a request to the Supreme Court of Virginia to consider my Motion to Reconsider my Petition for Rehearing En Banc. I hope the Court will weigh all the facts and reverse this tragic wrongful conviction.

I am filing as a pro se petitioner and am unsure of the exact procedure. I ask you to assist me in filing my request. Please contact me as noted above with your comments or concerns.

I Am,

/s/David K. Sumrell

IN THE SUPREME COURT OF VIRGINIA
Supreme Court Building
100 North 9th Street, 5th Floor
Richmond, Virginia 23219

Re: David K. Sumrell v. Commonwealth of Virginia
Record No. 981471

MOTION TO RECONSIDER

PETITION FOR REHEARING EN BANC

I received a letter dated November 6, 1998 from the Clerk of the Court that indicates my Petition for Rehearing En Banc has been dismissed because I did not file in a timely manner. On September 11, 1998, I was notified that the Supreme Court of Virginia found no reversible error with the Circuit Court of Virginia Beach's decision regarding my writ of error coram vobis. It was my understanding that I had 30 days in which to file a Petition for Rehearing En Banc. Under ordinary circumstances, October 11, 1998, should have marked the end of the thirty-day filing deadline. October 11, 1998 was on Sunday and Monday, October 12, 1998, was a holiday. My Petition was postmarked on Tuesday, October 13, 1998 and it was received by the Clerk's office on Wednesday, October 14, 1998.

When I received the above-referenced letter from the Court, I was stunned--in shock. I telephoned the Clerk's office the next morning, Tuesday, November 10, 1998, and spoke with Ms. Krueger. She indicated there are two scenario's regarding filing requirements--one has a thirty-day filing requirement and the other has a fourteen-day filing requirement. She stated that in my case I was required to file within fourteen, not thirty, days. At that time, she advised me to file a Motion to Reconsider my Petition for Rehearing En Banc.

I apologize for the late filing. I am a Pro-Se petitioner. I have used extraordinary measures to ensure compliance with all requirements known to me. However, the barriers to understanding the convoluted language are overwhelming for a lay person such as myself. I have fought continuously for nearly ten years to clear my name.
I request that the Court carefully review both my Writ of error coram vobis and my Motion to Reconsider. Each clearly illustrates the errors in fact associated with my original trial. If the Court had known about these errors, then the verdict would not have been "guilty." My Writ of error coram vobis demonstrates that neither an Appeal nor a Motion to Reconsider would have revealed that my trial attorney concealed evidence from the Court. He also deliberately and knowingly lied to the Court for reasons unknown to me even to this day.

I have been denied both my Virginia and United States Constitutional rights. Rights to a fair trial. Rights to an Appeal. Rights to post-trial relief. My next step is to file a Writ of error certiorari in the Supreme Court of the United States. In that document I will outline seven Constitutional violations--including conspiracy under colors of state and the tainted facts used by the prosecutor to get an indictment. **What has been done to me is wrong and I intend to prove it.**

Even after being wrongfully convicted of a crime which never existed, I have tried to maintain my sincere belief in the Commonwealth and in our judicial system. In my lawsuit in the Federal Court system, I demonstrated that my post-trial attorney was negligent and guilty of malpractice.

While conducting research for that lawsuit, I found a seldom-used state remedy, a Writ of error coram vobis. This state remedy has very specific applications and my case is covered by the intent of the Writ of coram vobis. This remedy provides an avenue for correcting a mistake--an avenue not even addressed with an Appeal or Motion to

Reconsider. After I uncovered this remedy, I asked the Federal Court to hold their ruling to allow Virginia Beach an opportunity to correct their mistake. The Federal Judge, Rebecca Smith, ruled that I should be given every opportunity to clear my name. In addition, Judge Smith ruled I could pursue relief from my post-trial attorney who, by his own admission, failed to file a Motion to Reconsider in a timely manner and completely failed to file an Appeal on my behalf.

Along with my post-trial attorney, the Supreme Court of Virginia was a defendant in this federal lawsuit. Quite coincidentally, within thirty-one days after being served papers, a relevant and significant law was changed. The law provided that an attorney cannot be sued until after a conviction is overturned. This new law protects lawyers who are guilty of negligence and malpractice and other actions that cost defendants their freedom.

Is there not a conflict of interest here? When the Supreme Court of Virginia can be a defendant in a lawsuit and subsequently preside over the same set of facts, the playing field is not level. It is not in the Commonwealth's nor the Court's best interests for my conviction to be overturned. I am deeply concerned with the legality of this situation and will include it in my petitions to the Supreme Court of the United States.

I am asking the Supreme Court of Virginia to look at the facts. I have neither deliberately cheated anyone nor stole from anyone. The charge of embezzlement was wrong. Any charge would have been wrong. I owned the equipment in question and never tried to cheat anyone out of anything.

I have erred by filing late and I recognize the Court has final authority in the matter of timely filing. However, I have tried with every breath I breathe to follow all guidelines to insure that something like this did not happen. I am not a lawyer. I have no excuse for filing late. However, I do know the importance and gravity of such an action.

When I was originally charged with this crime, I was offered the option of pleading guilty to a lesser charge. Confident that I had done nothing wrong, I refused that offer. I have spent inordinate resources--both time and money--in the past nine years trying to correct this grave injustice.

I need your help and consideration in this matter. Please grant this Motion to Reconsider my Petition for Rehearing. Please do so in the name of justice. Show that Justice is not blind; although her eyes are covered, she can still see the TRUTH..

I am,

/s/David K. Sumrell

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July 15, 1996

Richard C. Vorhis
Assistant Bar Counsel
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2803

Re: In the Matter of Moody Eason Stallings, Jr.
VSB Docket #96-021-2525
Complainant: David K. Sumrell

Dear Mr. Vorhis:

In response to the complaint filed by David Sumrell, I have enclosed numerous documents and pleadings. I will try to be brief and if you feel you need more information, please contact me.

First, Mr. Sumrell did not retain me until after the 21 days had expired. He retained me on the 23rd day and only to file for reconsideration of his sentence. I advised him that

an appeal would be a waste of money and he agreed. I knew that 21 days were up; however, I had a "friendly" prosecutor, Tom Watkins, on the other side, and I knew he would not raise the jurisdictional issue. In fact, he did not raise it, an Order was entered staying the conviction by Judge Rosenblatt at the first hearing on November 13, 1989. I was in no hurry to re-set the matter for my client was technically not convicted, and I wanted to avoid the original judge, Judge Russo who was close to retirement. I delayed the matter for over a year, but was forced to a hearing in front of Judge Russo, who himself determined that the 21 days had expired. It was not raised by the Commonwealth's attorney, and he refused to re-consider the previous sentence.

Obviously, the client was upset, blamed me and threatened a lawsuit if I did not refund his fee of $3,000. To settle with Mr. Sumrell, I refunded his fee in full and my attorney at the time had him sign a release. Mr. Sumrell was represented as the Release states when he settled the "alleged" claim against me.

He sued me anyway but the Court dismissed the suit, stating he had waived any claim in settlment, among other reasons. (Please review Settlement Agreement as to dates of importance.)

Again, this is short and to the point; however, I will be more than glad to follow up with any information you may need.

Sincerely yours,

/s/Moody E. Stallings, Jr.

MESjr/ptg

Enclosures